

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-7626

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

ORIGINAL
WITH PROOF
OF SERVICE

ANNA R. JOHNSON and ROBERT K. JOHNSON,

Plaintiffs-Appellants,

-against-

PHILLIP KNAPP,

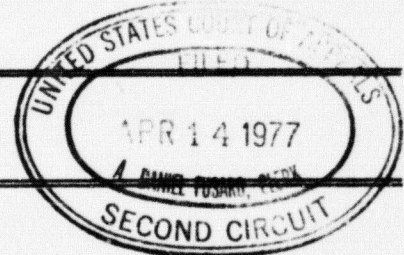
Defendant-Appellee.

B

P/S

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX



HELEN F. KRAUSE
Attorney for Plaintiffs-Appellants
P.O. Box 64
Trumbull, Connecticut 06611

ANTHONY L. SCHIAVETTI
Attorney for Defendant-Appellee
c/o ARTHUR N. SEIFF
51 Chambers Street
New York, New York 10007

(6183A)

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIESCIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE CHAMBER

Jury demand date:

D. C. Form No. 10a Rev.

by plaintiff 12-17-74

TITLE OF CASE

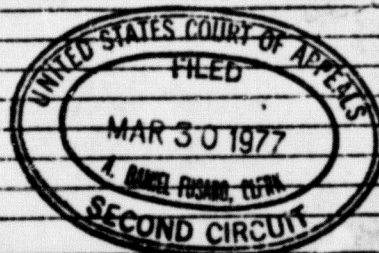
ATTORNEYS

ANNA R. JOHNSON AND
ROBERT K. JOHNSON
VS.PHILLIP KNAPP, AND
D. JACKSON COLEMAN,

For plaintiff:

PAUL D. PLEDGOLD
200 PARK AVENUE, N.Y.C. 10017 661-001

For defendant:

ANTHONY L. SCHIAVETTI
1610 Broadway-NYC 10019 (489-7500)
(for depts.)
c/o Arthur N. Seiff
51 Chambers St NYC 10007 (72

STATISTICAL RECORD		COSTS	DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed	X	Clerk	4/15/75	Thompson	15	
J.S. 6 mailed	✓	Marshal	5/21/75	Klaus	5	
Basis of Action:		Docket fee				
FED. IND. ACT.		Witness fees				
Action arose at:		Depositions				

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DOCKET ENTRIES

D. JACKSON COLEMAN ET-AL VS. PHILLIP KNAPP AND D. JACKSON COLEMAN.

(17-82)

34 01 5-13

DATE	PROCEEDINGS	Date Order Judgment etc
12-1-75	Filed Complaint, Issued Summons.	
na. 22-75	Filed summons and return-served the following: D. Jackson Coleman by Janet Letscher on 1-17-75 Dr. Phillip Knapp by Mrs. Daley on 12-30-74	
ab. 24-75	Filed stip & order extending deft. D. Jackson Coleman's time to answer to 2-25-75. So ordered- CONNER, J.	
b. 28-75	Filed ANSWER of deft. Phillip Knapp to the complaint	A.L.S.
eb. 28-75	Filed ANSWER of deft. D. Jackson Coleman to the complaint	A.L.S.
eb. 28-75	Filed deft. Phillip Knapp's interrogs.	
eb. 28-75	Filed deft. D. Jackson Coleman's interrogs.	
eb. 28-75	Filed pl'tffs' cross notice of taking depositions of defts. on 5-13-75	
ay 5-75	Filed pl'tffs' interrogs. to deft. D. Jackson Coleman	
y 5-75	Filed pl'tffs' interrogs. to deft. Phillip Knapp.	
ay 7-75	Filed defts' notice re: request for hospital records.	
v. 14-75	Filed pl'tff's answers to interrogs. demanded by deft. P. Knapp.	
v. 14-75	Filed pl'tff's answers to interrogs. demanded by deft. J. Coleman.	
uly 23-75	Filed deft. Phillip Knapp's answers to interrogs.	
ug. 6-75	Filed deft. Donald Jackson Coleman's answers to interrogs.	
ug. 19-75	Filed pl'tff's affdvt. & notice of motion compelling answers to sets of interrogatories served upon the defts and for award of costs.... Ret. 8-19-75.	
it. 9-75	Filed memo endorsed on motion filed 8-19-75.... Motion granted in part at oral hearing 9-5-75. So ordered Conner, J....	
9-7-75	PRE-TRIAL CONFERENCE HELD BY CONNER, J.	
t. 1-75	Filed deft. Donald Jackson Coleman's supplementary answers to interrogs.	
t. 3-75	Filed deft. Phillip Knapp's supplementary answers to interrogs.	
2-13-75	Filed pl'tffs' notice of taking deposition of Dr. Marvin Sears on 03-01-75	
2-18-75	Filed stip & order that the defts' answers are amended to include as indicated. So ordered- CONNER, J.	
3-09-75	Filed pl'tffs' notice of taking deposition of Dr. Marvin Sears on 3-29-75	
3-12-75	PRE-TRIAL CONFERENCE HELD BY CONNER, J.	
03-24-75	Filed defts' affdvt. and notice of motion for an order establishing a Medical Malpractice Panel. Ret. 04-02-75	
3-24-75	Filed defts' memorandum of law in support of motion.	
3-30-75	Filed pl'tff's affdvt. of Paul D. Rheingold in opposition to motion for the appointment of a medical malpractice panel.	
03-30-75	Filed pl'tff's brief.	
04-06-75	Filed "Memorandum and Order-Opinion #11179-- for the reasons stated, defts' application for a pre-trial convention of a Medical Malpractice Panel pursuant to the provisions of N.Y. Judiciary Law Section 148-a, must be denied. So ordered- CONNER, J. (m/n)	
04-20-75	Filed pl'tffs' requests to charge.	(W.F.C.)
04-26-75	BEFORE CONNER, J. Jury trial begun.	
04-27-75	trial cont'd	
4-28-75	trial cont'd. Deft. motion to dismiss complaint as to deft. Jackson Coleman-granted.	
4-29-75	trial cont'd	
05-03-75	trial cont'd	
5-04-75	trial cont'd and concluded. Jury verdict for deft.	
05-2-75	Filed Judgment- that deft. Dr. Phillip Knapp have judgment against pl'tffs. dismissing the complaint- and that the complaint is dismissed as to deft. Dr. Jackson Coleman. Clerk. approved- (m/n)	
5-20-75	Filed pl'tffs' notice of appeal to USCA from the judgment entered on 5-4-75. Copies mailed to: Paul Rheingold and Anthony L. Schiavetti. Ent. 5-27-75	
5-01-75	Filed notice that the record on appeal has been certified and transmitted to the USCA this date.	
5-17-75	Filed stipulation that the exhibits be transmitted to USCA as part of r	

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DOCKET ENTRIES

1976 - 1977 U.S. District Court, District of Columbia

7/1/77 543

Civil Docket Continuation

(PAGE # 3)

CONNER, J. J.

DATE	PROCEEDINGS	Ju
07-07-76	Filed notice that the supplemental record on appeal has been certified and transmitted to the USCA on this date.	
07-15-76	Filed true copy of USCA stip & order that pliffs' appeal from the judgment in favor of deft-appelle D. Jackson Coleman is withdrawn and discontinued.	20
08-11-76	Filed notice that the supplemental record on appeal has been certified and transmitted to the USCA this date.	
8-11-76	<i>Filed Manuscript dated April 26, 27, 28 & May 3, 4, 1976</i>	
08-19-76	Filed Notice that supplemental record on appeal has been certified and transmitted to the USCA 2nd Circuit this day.	
08-26-76	Filed Pliffs Notice of Motion for an order that copy of attached letter dated 6-2-76 from juror No. 5, to atty for deft & copy of accompanying newspaper article attached to letter be made part of record on appeal to USCA 2nd Circuit. (no return date)	
09-29-76	Filed Notice that supplemental record on appeal has been certified and transmitted to USCA for 2nd Circuit this day.	
09-27-76	Filed deposition of Marvin L. Sears, taken by plaintiffs on April 9, 1976.	
10-15-76	Filed pliffs' affdvt. and notice of motion for an order overturning the verdict rendered on 5-4-76 and for a new trial.	
0-20-76	Filed Deft's opposing affidavit in opposition to pliffs' motion for new trial, by Arthur N. Seiff.	
0-22-76	Filed Deft's Memorandum of Law in opposition to pliffs' motion for a new trial.	
11-19-76	<i>Filed transcript of record of proceedings dated 4-26-76</i>	
11-24-76	Filed Memorandum and Order-- for the reasons stated, were this action remanded by the Court of Appeals, pliffs' motion would be denied. So ordered- CONNER, J. 9m/n)	72
12/15/76	Filed plaintiffs' notice of appeal from the memorandum and order of Judge Conner dtd: 11/24/76, to the USCA.	
12-20-76	Filed true copy of USCA order affirming the District Court's judgment with costs to be taxed against the appellants. (m/n)	
12 27 76	Filed notice of change of address of atty for deft	

A-3

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A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

Deputy Clerk

Plaintiffs' Notice of Motion for an order overturning the verdict rendered for the defendant on May 4, 1976 for a new trial etc.

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNA R. JOHNSON and ROBERT K. JOHNSON

Plaintiffs

CIVIL 74-5437

-against-

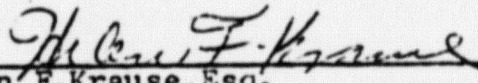
NOTICE OF MOTION

PHILLIP KNAPP

Defendant

PLEASE TAKE NOTICE that upon the annexed affidavit of Helen F. Krause, sworn to October 13, 1976, and upon all the papers on file in this Court, plaintiffs will move this Court for an order overturning the tainted verdict rendered for the defendant on May 4, 1976, and for a new trial, and for such other and further relief as may be just and proper.

Dated: Trumbull, Connecticut
October 13, 1976.


Helen F. Krause, Esq.
Attorney for Plaintiffs
P.O. Box 64
Trumbull, Connecticut, 06611

TO:
Anthony L. Schiavetti
Attorney for Defendant
Office and Post Office Address,
c/o Arthur N. Seiff,
51 Chambers Street
New York, New York, 10007

Plaintiffs' Motion to overturn verdict for a
new trial under Rule 59.

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNA R. JOHNSON and ROBERT K. JOHNSON

Plaintiffs

CIVIL 74-5437

-against-

PHILLIP KNAPP

Defendant

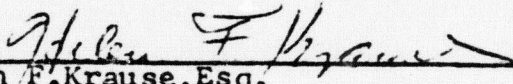
MOTION TO OVERTURN TAINTED VERDICT
AND FOR A NEW TRIAL UNDER RULE 59

The plaintiffs hereby move for an order of this Court to overturn the tainted verdict for the defendant, Philip Knapp, rendered in this case, pursuant to Rule 59 of the Federal Rules of Civil Procedure, based upon the annexed affidavit of Helen F. Krause sworn to October 13, 1976, and upon all the papers on file in this Court, which show gross misconduct and physical incapacity of a juror, namely Juror No. 5, Laura Lee Lewis, which only recently came to the attention of the plaintiffs' counsel.

Juror No. 5 had only partial hearing and failed to reveal this fact to the Court, she did not hear the evidence of the said plaintiffs, as shown by her letter to defendant's counsel attached herewith as an Exhibit, and the letter shows that it was about this case, and clearly shows that this verdict was an unjust verdict and prejudicial to the plaintiffs and prevented them from being accorded a fair trial.

Juror No. 5's communication by letter to the defendant's counsel, clearly demonstrates the state of mind of this juror to be prejudicial to the plaintiffs, and the writing of the letter shows from the contents thereof that this Juror No. was guilty of gross misconduct, and that the verdict reached by this jury was not reached by the conscientious observance of the oath taken by this jury, more particularly, Juror No. 5, Laura Lee Lewis.

WHEREFORE, the plaintiffs move this Court for an order overturning this tainted verdict rendered on May 4, 1976, in favor of the defendant, Phillip Knapp, and for a new trial.


Helen F. Krause, Esq.
Attorney for Plaintiffs
P.O. Box 64
Trumbull, Connecticut, 06611

TO:
Anthony L. Schiavetti,
Attorney for Defendant
Office and Post Office Address,
c/o Arthur N. Seiff,
51 Chambers Street,
New York, New York 10007

Dated: Trumbull, Connecticut
October 13, 1976

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNA R. JOHNSON and ROBERT K. JOHNSON

Plaintiffs

CIVIL 74-5437

-against-

AFFIDAVIT IN
SUPPORT OF MOTION

PHILLIP KNAPP

Defendant

STATE OF CONNECTICUT)
COUNTY OF FAIRFIELD)

HELEN F. KRAUSE, being duly sworn, says:

1. I am counsel and appellate counsel for the plaintiffs, and submit this affidavit in support of our motion for an order overturning the tainted verdict rendered for the defendant on May 4, 1976, and for a new trial, and for such other and further relief as may be just and proper.

2. On May 4, 1976, a jury verdict was returned in this matter in favor of the defendant, Phillip Knapp, and on May 20, 1976 Notice of Appeal was filed in the United States Court of Appeals for the Second Circuit on behalf of the plaintiffs, and is still pending.

3. On July 20, 1976, trial counsel for the plaintiffs told me that he had a conversation about a week before July 20, 1976, with trial counsel, Walter Begos, in which Mr. Begos revealed to him that he had received a letter from a lady juror after the verdict and that it was not favorable to the plaintiffs.

4. Upon learning of this letter from the juror I made a motion to the United States Court of Appeals for the Second Circuit to have the defendant produce this letter from the juror and that it be made part of the record on appeal.

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5. The reason for making this motion was that I had on July 20, 1976 sent a letter to Mr. Walter Begos and asked him to send me a copy of this letter, however, there was no response to that letter.

6. On August 16, 1976, the said motion was made to the Court of Appeals, and as a result of that action taken by me, counsel for the defendant on appeal, Arthur N. Seiff obtained a copy of that letter and attached newspaper clipping and sent it to me.

7. Because of the contents of that letter from the lady juror and the attached clipping, it is necessary that the plaintiffs have a new trial, because it is apparent that the letter was a communication only about this case and it shows prejudice against the plaintiffs and favoritism for the defendant because of an apparent romantic infatuation this juror had with trial counsel for the defendant during and after the trial of this case, making it impossible for her to render a fair and just verdict for the plaintiff, and showing that she failed to observe her oath as a juror, and that she failed to reveal to the Court that she only had partial hearing and could not hear all the evidence, and could only hear the loud "resonance" voice of the defendant's counsel which "titillated" her as she put it in her letter to the defendant's counsel.

8. The newspaper clipping which she sent along with the letter shows that ten days before the trial she had a preconceived idea that a cataract operation was a simple, comical, operation, and she also failed to reveal this fact to the Court at the time of selection of the jury.

A-8

9. This lady juror, Laura Lee Lewis, Juror No. 5, decided the case not on the evidence but on her fantasies, rendering an unjust verdict against the plaintiffs in this most serious case of malpractice, resulting in total blindness to the plaintiff, Anna R. Johnson, following cataract surgery, which this juror treated as a funny joke.

Helen F Krause
Helen F. Krause

Subscribed and sworn to before me, this 13th day of
October, 1976.

Salvatore De Piana
Commissioner of Superior
Court
Fairfield County

Letter of July 20, 1976 from Helen F. Krause, Esq.
to Walter Begos, Esq. with certified mail receipt.

HELEN F. KRAUSE

SUITE 543
855 MAIN STREET
BRIDGEPORT, CONN.

Attorney at Law

A-9

MAILING ADDRESS
POST OFFICE BOX 64
TRUMBULL, CONN. 06611

TELEPHONE 368-2565
TRUMBULL OFFICE 268-6390

July 20, 1976

Attorney Walter Begos
% Anthony Schiavetti, Esq.
1633 Broadway
New York, N.Y. 10019

Re: Johnson vs. Knapp

Dear Mr. Begos:

It has come to my attention that you received
a lady juror's letter after the verdict in the above case which
you tried in the U.S. District Court at Foley Square.

Please send me a copy of this letter by return
mail. As you know this case is on appeal and Mr. Rheingold is
not the appellate counsel, I am.

If I do not receive this letter I shall make the
proper motion before the Court to obtain the same.

Very truly yours,

HFK/ms

Helen F. Krause

1. The following service is requested (check one). <input type="checkbox"/> Show to whom and date delivered..... 15¢ <input type="checkbox"/> Show to whom, date, & address of delivery.. 35¢ <input type="checkbox"/> RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢ <input type="checkbox"/> RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢		2. ARTICLE ADDRESSED TO:	
3. ARTICLE DESCRIPTION: REGISTERED NO. <u>842449</u> CERTIFIED NO. <u>842449</u> INSURED NO.	(Always obtain signature of addressee or agent) I have received the article described above. SIGNATURE <input type="checkbox"/> Addressee <input type="checkbox"/> Authorized agent <i>Walter Begos</i>		
4. DATE OF DELIVERY	TO POSTMARK AUG 10 1976 CLERK'S INITIALS		
5. ADDRESS (Complete only if requested)	6. UNABLE TO DELIVER BECAUSE		

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Plaintiffs' Notice of Motion for an order requiring
the defendant/appellee to produce for inspection
a juror's letter.

A-10

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

ANNA R. JOHNSON and
ROBERT K. JOHNSON,
Plaintiffs-Appellants

-against-


PHILLIP KNAPP
Defendant-Appellee

CIVIL

DOCKET NO. 76-7249
74-5437

SIRS:

PLEASE TAKE NOTICE, the plaintiffs-appellants will move
this Court at a Motion Term to be held at the U.S. Court House,
Foley Square, New York, New York, ex parte, upon these papers, or
at such other time as the Court shall direct, for an order re-
quiring the defendant-appellee, through his attorneys, to produce
for inspection the juror's letter referred to in these papers,
and for other relief as may be just and proper.


HELEN F. KRAUSE
Attorney for Plaintiffs-
Appellants
P.O. BOX 64
Trumbull, Connecticut, 06611

TO: Attorney Anthony L. Schiavetti
Attorney for Defendant-Appellee
1633 Broadway
New York, N.Y. 10019

Attorney Arthur N. Seiff
Attorney for Defendant-Appellee
51 Chambers Street
New York, N.Y. 10007

Clerk, United States Court of Appeals
Second Circuit
Foley Square
New York, N.Y.

Plaintiffs' Motion for Production of copy of letter sent to and now in the possession of counsel for the defendant, Phillip Knapp concerning this verdict now on Appeal before this Court.

A-11

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANNA R. JOHNSON and ROBERT K. JOHNSON

Plaintiffs-Appellants

-against-

PHILLIP KNAPP

Defendant-Appellee

UNITED STATES
COURT OF APPEALS
NO. ~~76-7249~~

76-7249

MOTION FOR PRODUCTION OF COPY
OF LETTER SENT TO AND NOW IN
THE POSSESSION OF COUNSEL FOR
THE DEFENDANT, PHILLIP KNAPP
CONCERNING THIS VERDICT NOW
ON APPEAL BEFORE THIS COURT

Pursuant to Rule 27(g) of the Rules of the United States Court of Appeals for the Second Circuit, the plaintiffs, Anna R. Johnson and Robert K. Johnson, hereby move that counsel for the defendant, Phillip Knapp, be required to file in this court a copy of a letter sent to him by a juror concerning this verdict for the defendant which is now on appeal before this court.

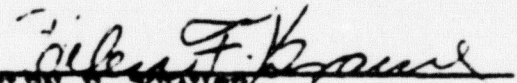
On July 20, 1976, counsel on appeal for the plaintiffs-appellants was informed by the trial counsel in this case, that Attorney Walter Begos, trial counsel for the defendant-appellee, Dr. Knapp, had received a letter from a juror which was not favorable to the plaintiffs-appellants, indicating a possible prejudice against the plaintiffs-appellants in the rendition of the verdict, and misconduct of the jury.

On July 20, 1976, a request was made in writing to said counsel for the production of a copy of this letter, but has not

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received any reply to said request.

In the interest of public welfare and justice in this most serious case which resulted in the total blindness of the plaintiff-appellant, Mrs. Anna R. Johnson, it is felt that this letter now in the possession of counsel for the defendant be produced in this court for inspection and copying in order to determine whether or not the jury were prejudiced against the plaintiffs-appellants and returned a unjust verdict against them.


HELEN F. KRAUSE
Attorney for Plaintiffs-
Appellants

P.O. Box 64
Trumbull, Connecticut, 06611

TO: Attorney Anthony L. Schiavetti
Attorney for Defendant-Appellee
1633 Broadway
New York, N.Y. 10019

Attorney Arthur N. Seiff
Attorney for Defendant-Appellee
51 Chambers Street
New York, N.Y. 10007


Clerk, United States Court of Appeals
Second Circuit
Foley Square
New York, N.Y.

PROOF OF SERVICE

STATE OF CONNECTICUT)
COUNTY OF FAIRFIELD)

ss: Trumbull, August 9, 1976

HELEN F. KRAUSE, attorney for plaintiffs-appellants herein, hereby certifies that on August 9, 1976, she served the within papers upon Attorney Anthony L. Schiavetti, and Attorney Arthur N. Seiff, attorneys for the defendant-appellee, by depositing a true copy of the same in the U.S. mails at Trumbull, Connecticut, directed to said counsel at their addresses as above listed.


HELEN F. KRAUSE

Letter of August 12, 1976 from Arthur N. Seiff, Esq.
to Helen F. Krause, Esq.

ARTHUR N. SEIFF
ATTORNEY AT LAW
51 CHAMBERS STREET
NEW YORK, N.Y. 10007
RECTOR 2-7590

A-13

August 12, 1976

Helen F. Krause, Esq.
P.O. Box 64
Trumbull, Connecticut 06611

Re: Johnson v. Knapp
United States Court of Appeals
No. 76-7249

Dear Miss Krause:

Enclosed, as requested by you, is a copy of
the juror's letter received by Mr. Begos.

I assume that since there is no need therefor
that you are withdrawing your motion for such copy.

Faithfully yours,

Arthur N. Seiff

ANS:abd

By James B. Dobson

cc.: Walter A. Begos, Esq.
c/o Anthony L. Schiavetti, Esq.
1633 Broadway
New York, New York 10019

Typed copy of hand written letter dated June 2, 1976
from Laura Lee Lewis to Walter Begos, Esq.

A-14

TYPED COPY OF COPY OF ORIGINAL LETTER
DATED JUNE 2, 1976, FROM JUROR NO. 5, TO
DEFENDANT'S COUNSEL, WALTER BEGOS

F. L. L.

June 2, 1976

Dear Mr. Begos,

This letter is several weeks overdue as I was
selected for another case after JOHNSON VS. KNAPP,
(April 26, 1976)

The reason I wish to write you was to let you know
being my first experience as a juror, I found your pre-
sentation as a trial lawyer titillating.

Your enunciation and fine resonance voice helped me
to follow the case effortlessly as I have partial hearing
and given to much more care and observance to the speaker.

During your summation when you emphasized to the jury
not to let the personality of the lawyers influence our
decision---well, you almost lost Juror No. 5-- as I thought
you might have directed that one to me!

I was wondering if that was a difficult one for you--
I was pleased of the outcome, but annoyed it took a full day.

Thanking you for making my day in Court an enjoyable
experience.

Fondly

s/Laura Lee Lewis

P.S. Enclosed is a clipping dated 4/16 which caught my
attention 10 days before the case--

A-15

J. L. L.

June 2, 1976

Dear Mr. Begos,

This letter is several weeks overdue as I
was selected for another case after Johnson vs.
Krupp (April 26, 1976)

The reason I wish to write you was to let
you know being my first experience as a juror, I
found your presentation as a trial lawyer titillating.
Your enunciation and fine resonance voice
helped me to follow the case effortlessly as
I have partial hearing and given to much more
care and observance to the speaker.

During your summation when you
emphasized to the jury not to let the personality
of the lawyers influence our decision — well, you
almost lost Juror No. 5 — as I thought you
might have directed that one to me!

I was wondering if that was a difficult
one for you — I was pleased of the act come,
but annoyed it took a full day.

Thanking you for making my day in
Court an enjoyable experience.

Fondly,

Laura Lee Lewis

P.S. Enclosed is a clipping dated 4/16 which caught
my attention 10 days before the case-

BEST COPY AVAILABLE

Newspaper clipping attached to Laura Lee Lewis'
letter of June 2, 1976.



It Happened Last Night

EARL WILSON

Eye to Eye With Dr. Charley

Lovely Joey Heatherton, a born chatterbox, sat in respectful silence as Dr. Charles Kelman, the get-'em-out-fast cataract surgeon, recounted how he teaches his surgery method to other doctors for a week, then invites them to a "commencement."

"It turns out to be a cocktail show at the Gaslight Club where I play the sax clarinet and piano, sing about 15 songs and tell jokes," Charley Kelman said. He sings his commencement address to the tune of "My Way," like this:

"Practice hard on eye-bank eyes/
Because if you don't you just might
fall/ And, don't call me if you're in
jail/ I couldn't lie/ I'd testify/ 'T
wasn't MY way."

CHARLEY a native Brooklynite who helicopters into NY from his Old Westbury home that looks like the Guggenheim Museum (the helicopter is red, white and blue) started in life on the Horn & Hardart radio show but developed a cataract surgery method getting the patient out the same day.

Joey Heatherton, a friend of his wife and three children, will sing and dance on his benefit concert at Carnegie Hall May 15 for the Louis Braille Foundation for Blind Musicians.

Doctor Charley performed surgery on Jan Peerce, Lionel Hampton and William B. Williams. Willie B. gave an eloquent testimonial: "You haven't lived until you've had Charley hovering over you removing your cataract while singing 'I Only Have Eyes for You.'"



DR. KELMAN

Mamma A-16 can dish out all you can take!

Mamma Leone cooks great
Italian food and plenty!
So come hungry!

And don't forget Mamma's
luncheon buffet.

**Mamma
Leone's**
239 West 48th Street
JU 6-5151



A great place for
your next party.

Another Restaurant Associate Great Place.

Hi Lads & A Lads

Appearing April 5-May 1

Super disco dancing, Dinner and late supper, 3 shows nightly.
No minimum. Cover charge \$3 Monday-Thursday.
\$5 Friday and Saturday Special dinner
and show 9 PM. - \$15 including cover charge.
Closed Sundays. Reservations 421-0900
Jazz at Noon-Friday.

Shepherd's
Park Avenue at 56th Street

BEST COPY AVAILABLE

39 NEW YORK POST, FRIDAY, APRIL 16, 1976

9

Opposing affidavit of Arthur N. Seiff, Esq. for
defendant.

A-17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ANNA R. JOHNSON and ROBERT K. JOHNSON,
Plaintiffs,

74 Civil 5437

-against-

OPPOSING AFFIDAVIT

PHILLIP KNAPP,

Defendants.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK)

ARTHUR N. SEIFF, being duly sworn, says:

I am counsel for defendant and submit this affidavit
and the annexed affidavit of Walter Begos in opposition to
plaintiffs' motion for a new trial.

There are three factors that compel the denial of
plaintiffs' motion, any one of which of itself is sufficient for
its denial. (1) There is no basis in fact for plaintiffs'
attorney's argument. (2) The attempt of plaintiffs' attorney
to impeach the verdict is impermissible. (3) Plaintiffs' motion
for a new trial, made "pursuant to Rule 59 of the Federal Rules of
Civil Procedure", was not made within the time limited by Rule 59
for such a motion.

As to the first factor, it will be noted that
plaintiffs' motion is based on nothing but baseless conjecture
and speculation on the part of their attorney who misinterprets the
letter of juror 5 and the clipping enclosed therewith, on which
plaintiffs' motion is based. There is nothing in that letter or

clipping to justify the argument that plaintiffs' attorney makes, which is (1) that the juror could not hear the evidence in the trial and (2) that the juror's verdict was influenced by a romantic infatuation with defendant's trial counsel.

The annexed affidavit of Mr. Begos establishes conclusively that there is no basis for plaintiffs' attorney's argument.

It will also be noted that the juror did not say, nor did she infer, that she was prevented from hearing the evidence in this case; nor is there anything in her letter that would permit an inference that she could not hear the evidence. In fact, the contrary is evident, that she was "given to much care and observance to the speaker."

Nor is there anything in the clipping enclosed with that letter to justify plaintiffs' attorney's construction thereof or to call for a new trial.

The second factor, that plaintiffs' motion is impermissible, consists of a question of law and therefore is reserved for, and established in, our memorandum of law submitted herewith.

The third factor, that plaintiffs' motion was not made timely, is established by the fact that, as is shown by the records of this Court, the judgment plaintiffs seek to have this Court (a) set aside and (b) order a new trial, was entered in this Court on May 7, 1976 (the jury's verdict having been rendered on May 4, 1976). Rule 59 of the Federal Rules of Civil

A-19

Procedure for the United States District Courts, which governs motions for "New Trials", and on whose authority plaintiffs expressly base their motion, provides: "A motion for a new trial shall be served not later than 10 days after the entry of the judgment." Plaintiffs' motion was made on August 9, 1976.

Although not relevant to the questions raised by plaintiffs' motion, I ask leave to refute an implication made by Miss Krause that we tried to keep the juror's letter and the clipping from her. Before she wrote Mr. Begos, Miss Krause knew for more than a month that I was counsel for defendant and that the address to which she should address all communications to defendant's attorney should be to my address, 51 Chambers Street, New York, New York 10007, as stated in a written notice served on her and filed in Court on June 14, 1976. When her letter of July 20, written to Mr. Begos and not to me, was received in my office I was on vacation and when it came to my attention following my return, I sent her the juror's letter and clipping as requested by her. The implication in Miss Krause's affirmation that this was compelled by the Court of Appeals is misleading. She neglects to inform this Court that I complied with her request voluntarily whereas the Court of Appeals rejected her motion.

WHEREFORE, I respectfully request that plaintiffs' motion be denied.

s/ Arthur N. Seiff
Arthur N. Seiff

Sworn to before me this
20th day of October, 1976.

AIKNE B. DOBKIN
Notary Public, State of New York
No. 03-0973650
Qualified in Bronx County
Commission expires March 30, 1977

A-20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ANNA R. JOHNSON and ROBERT K. JOHNSON,

74 Civil 5437

Plaintiffs,

OPPOSING AFFIDAVIT

-against-

PHILLIP KNAPP,

Defendant.
-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK)

^A
WALTER BEGOS, being duly sworn, says:

I was trial counsel for defendant and am the attorney to whom juror 5 wrote the letter annexed to plaintiffs' motion papers.

The argument of plaintiffs' attorney, Miss Krause, regarding the hearing of juror 5 is conclusively refuted by the minutes of the voir dire of the jury by the Trial Judge, which included the following:

"THE COURT: Juror number 5, Miss Lewis, you live in New York City?

P.J. 5: Yes, I do.

THE COURT: How long have you lived here?

P.J. 5: Ten years.

THE COURT: Are you married?

P.J. 5: No, I am not.

THE COURT: What kind of work do you do?

P.J. 5: I am a secretary at Rockefeller Center, Inc.

A-21

THE COURT: How long have you worked there?

P.J. 5: Since November of '75.

THE COURT: What did you do before that?

P.J. 5: I was a real estate salesman.

THE COURT: in New York City?

P.J. 5: Yes."

In this connection, it is pertinent that the witnesses were seated closer to the jury than was the Trial Judge. So also were the attorneys when they questioned the witnesses.

Miss Krause, on whose affirmation plaintiffs' motion is based, was in Court during every minute of the trial, including the voir dire of the jury.

As to plaintiffs' attorney's other argument, based on the juror's letter to me, I state categorically that there never was any communication, oral or otherwise, between any of the jurors and me, including juror 5, at any time except my receipt of that letter, to which I never replied in any manner whatever.

Plaintiffs' trial counsel, Paul Rheingold, who was plaintiffs' attorney of record and who also was trial counsel for plaintiffs, told me, when he was apprised by me of that letter, that he did not attach any significance thereto, that he himself had many times heard from jurors after trials and that he had never attributed any significance to them. He also told me that he felt that his client and he had had a fair trial. It may be noted that Mr. Rheingold was attorney of record, as well as trial counsel, for plaintiffs.

A-22

As soon as I received Miss Krause's letter of July 20 I forwarded it to Mr. Seiff for his attention because Mr. Seiff was counsel for defendants in this case in which I had merely been trial counsel.

/ Walter A. Begos
Walter Begos

Sworn to before me this

19th day of October, 1976.

Dalores Palmer
Notary Public, State of New York
No 24-4029079
Qualified in Kings County
Commission Expires March 30, 1978

Closed

A-23

copy

U.S. District Court.
Filed
Nov 24, 1976
S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
ANNA R. JOHNSON and ROBERT K.
JOHNSON,

Plaintiffs,

- against -

PHILLIP KNAPP,

Defendant.
----- X

:
:
74 Civ. 5437
(WCC)
:

:
MEMORANDUM
AND ORDER
:

A P P E A R A N C E S :

HELEN F. KRAUSE, ESQ.,
Attorney for Plaintiffs
P.O. Box 64
Trumbull, Connecticut 06611

ANTHONY L. SCHIAVETTI, ESQ.,
Attorney for Defendant
c/o Arthur N. Seiff
51 Chambers Street
New York, New York 10007

ARTHUR N. SEIFF, ESQ.,
Of Counsel

CONNER, D. J.:

On May 4, 1976, the above-captioned medical malpractice action, tried before this Court and a jury, was concluded by the jury's return of a verdict for defendant. An appeal from the judgment pursuant to that verdict is presently pending in the Second Circuit.

11/24/76
Microfilm
Nov 24, 1976

A-24

Plaintiffs now move this Court for a new trial under Rule 59 F.R.Civ.P. Although the time within which plaintiffs might have duly moved under Rule 59 had run prior to the filing of the instant motion, this Court will regard plaintiffs' application as a motion to set aside the judgment pursuant to Rule 60(b) F.R.Civ.P. Measured by the strictures of Rule 60, plaintiffs' motion is clearly timely.^{1/}

Plaintiffs rest their motion on a June 2, 1976 letter, as well as a newspaper clipping attached thereto, written by a member of the former jury panel and addressed to defendant's trial counsel. According to plaintiffs, the letter and its attachment demonstrate that the verdict rendered against plaintiffs had been tainted by juror prejudice.

The letter that has prompted the instant motion reads as follows:

"Dear Mr. Begos,

This letter is several weeks overdue as I was selected for another case after JOHNSON VS. KNAPP, (April 26, 1976).

The reason I wish to write you was to let you know being my first experience as a juror, I found your presentation as a trial lawyer titillating.

Your enunciation and fine resonance [sic] voice helped me to follow the case effortlessly as I have partial hearing and given to much more care and observance to the speaker.

A-25

During your summation when you emphasized to the jury not to let the personality of the lawyers influence our decision ---well, you almost lost Juror No. 5 -- as I thought you might have directed that one to me!

I was wondering if that was a difficult one for you-- I was pleased of the outcome, but annoyed it took a full day.

Thanking you for making my day in Court an enjoyable experience.

Fondly

s/ Laura Lee Lewis

P.S. Enclosed is a clipping dated 4/16 which caught my attention 10 days before the case -- "

The above-quoted communication, plaintiffs argue, reflects two aspects of gross juror misconduct on the part of its author: a romantic infatuation that blinded her, and a physical disability that deafened her, to the facts of the case as adduced at trial. Moreover, plaintiffs urge, the newspaper item to which that letter refers -- an account of the high jinks of one "Dr. Charlie," a "get-em-out-fast cataract surgeon" with a show business-eye's-view of his profession -- is evidence that, "ten days before the trial" of plaintiffs' claims for damages allegedly resulting from the negligent performance of a cataract operation, the juror "had a preconceived idea that a cataract operation was a simple, comical operation, * * * [but] failed to reveal this fact to the Court at the time of selection of the jury."

A-26

Were trial counsel straitened by judicial rule to act a part so dull that he might not inspire admiration, were a juror to be condemned for taking pains to observe the trial before her, or were a newspaper article casting doubt upon one surgeon's sober dedication to his work somehow to be construed as a litigative boon to another surgeon sued for alleged malpractice, plaintiffs' challenge to the jury verdict in their case might have some force. Even if such propositions were in some manner raised to the level of reasonableness, the present case would nevertheless fail to describe one of those exceptional circumstances warranting a divergence from the general rule that a juror's statement may not be used to impeach that juror's verdict, see McDonald v. Pless, 238 U.S. 264 (1915); Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971). In response to plaintiffs' motion, this Court can do no better than to remind plaintiffs that

"it would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test; and although absolute justice may require as much, the impossibility of achieving it has induced judges to take a middle course, for they have recognized that the institution could not otherwise survive; they would become Penelopes, forever engaged in unravelling the webs they wove." Jorgensen v. York Ice Machinery Corporation, 160 F.2d 432, 435 (2d Cir. 1947).

A-27

Were this action remanded by the Court of Appeals,
plaintiffs' motion would be denied.

SO ORDERED.

S/ WILLIAM C. CONNER
United States District Judge

Dated: New York, New York

November 24, 1976

A-28

Were this action remanded by the Court of Appeals,
plaintiffs' motion would be denied.

SO ORDERED.

S/ **WILLIAM C. CONNER**
United States District Judge

Dated: New York, New York

November 24, 1976

FOOTNOTES

1. Divested of its jurisdiction by the appeal now pending, this Court could not, of course, presently grant the relief now sought. However, the interests of judicial economy dictate this Court's present consideration of the motion's merits. See Ryan v. United States Lines Company, 303 F.2d 430, 433-34 (2d Cir. 1962); Harper Bros. v. Klaw, 272 F.894 (2d Cir. 1921).

Plaintiffs' Notice of Appeal.

U.S. DISTRICT COURT

A-30

Nov 15 3 25 PM '76

Filed 5th

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

ANNA R. JOHNSON and ROBERT K. JOHNSON)
Plaintiffs,)

-against-

PHILLIP KNAPP)
Defendant)

CIVIL ACTION
NO. 74-5437 WCC

PLAINTIFFS NOTICE OF APPEAL

Notice is hereby given that the plaintiffs hereby
appeal to the United States District Court of Appeals
for the Second Circuit from the judgment entered by the
United States District Court herein on the 24th day of
November, 1976.

Dated December 14, 1976, at Bridgeport, Connecticut.

Helen F. Krause
HELEN F. KRAUSE
Attorney for Plaintiffs
P.O. Box 64
Trumbull, Connecticut, 06611

SENT TO: ANTHONY L. SCHIAVETTI
1633 BROADWAY
NYC, N.Y. 10019

From GAD
40 days
strictly
H

Stipulation.

A-31

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNA R. JOHNSON and ROBERT K. JOHNSON,

Plaintiffs

74 Civil 5437

-against-

STIPULATION

PHILIPPE KNAPP,

Defendants,
-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK)

It is hereby stipulated and agreed by and between the attorneys or the respective parties hereto that the Record on Appeal from a judgement entered by the United States District Court herein on the 24th day of November, 1976 shall consist solely of the following documents:

Docket Entries

Plaintiffs' Notice of Motion for an order overturning the tainted verdict rendered for the defendant on May 4, 1976 for a new trial etc.

Plaintiffs' Motion to overturn tainted verdict for a new trial under Rule 59.

Affidavit of Helen F. Krause, Esq. for Plaintiffs in support.

Letter of July 20, 1976 from Helen F. Krause, Esq. to Walter Begos, Esq. with certified mail receipt.

Plaintiffs' Notice of Motion for an order requiring the defendant/appellee to produce for inspection a juror's letter.

A-32

Plaintiffs' Motion for Production of copy of letter sent to and now in the possession of counsel for the defendant, Philipp Knapp concerning this verdict now on Appeal before this Court.

Letter of August 12, 1976 from Arthur N. Seiff, Esq., to Helen F. Krause, Esq.

Typed copy of hand-written letter dated June 2, 1976 from Laura Lee Lewis to Walter Begos, Esq.

Photo copy of original hand-written letter from Laura Lee Lewis to Walter Begos, Esq. dated June 2, 1976.

Newspaper clipping attached to Laura Lee Lewis' letter of June 2, 1976.

Opposing affidavit of Arthur N. Seiff, Esq., for defendant.

Memo and Order of Conner D. J., District Judge.

Plaintiffs' Notice of Appeal.

Helen F. Krause
Helen F. Krause
Attorney for Plaintiffs

Arthur N. Seiff
Arthur N. Seiff
Attorney for Defendant

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Kenneth E. Kennedy, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1171 Sterling Pl.
B'klyn N.Y. 11213.

That on the 14th day of APRIL, 1977,
deponent personally served the within APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 1 true ^{copy} ~~copies~~ of same with a duly
authorized person at their designated office.

~~By depositing _____ true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

ANTHONY L. SCHIAVETTI
Attorney for Defendant-Appellee
c/o ARTHUR N. SEIFF
51 Chambers St.
New York, N. Y. 10007

Kenneth E. Kennedy

Sworn to before me this

14th day of APRIL, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979